81-2398

Office - Supreme Court, U.S.
FILED
JUN 30 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORTON BERGER
Office & P.O. Address
13 Eastbourne Drive
Spring Valley, N.Y. 10977
Phone: (914) 425-6484

Attorney for Petitioner

Questions Presented

1. Was the denial by the Court below of the Petitioner's request for an extension of time to file his brief on appeal or file an amended or supplemental brief on appeal after he had an opportunity to confer with counsel a violation of the Petitioner's Constitutional right to counsel as guaranteed by the Sixth and Fifth Amendments to the United States Constitution?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Reason For Granting The Writ	5
Conclusion	9
Appendix A—Opinion, United States Court of Appeals For The Second Circuit	10
Appendix B—Order Extending Time To File Petition For Writ of Certiorari	19
Appendix C—Copies of Mailgrams	20

TABLE OF AUTHORITIES

Cases:

Anders v. *State of California*, 87 S Ct. 1396, 386 US 738, 18 L Ed 2d (493) (1967)	6
Miranda v. *State of Arizona*, 86 S Ct. 1602, 348 US 436, 16 L Ed 2d 694 (1966)	6
Powell v. *State of Alabama*, 53 S Ct. 55, 28 7 U.S. 45 77 L Ed 158 (1932)	5

OTHER AUTHORITIES CITED:

United States Constitution:

Sixth Amendment	5, 6

Supreme Court of the United States

OCTOBER TERM, 1981

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The Court of Appeals reversed the judgment of the United States District Court for the Southern District of New York as to three counts of the indictment and affirmed the judgment of the Court as to five counts of the indictment on April 1, 1982. The decision of the Court of Appeals filed April 1, 1982, is reprinted at Pet. App. A, infra, pg. 10.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1982 (Pet. App. A, infra, P 10). The Petitioner made an application for an extension of time to June 30, 1982, to file a Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On June 2, 1982, the Petitioner's application was granted. A copy of the Court's Order extending Petitioner's time to file the Petition For Writ of Certiorari is reprinted at Pet. App. B, infra, pg. 19.

The jurisdiction of this Court is invoked under Title 18, United States Code, Section 1254 (1) and Rule 38 (b) of the Federal Rules of Criminal Procedure.

Statement of the Case

The Petitioner, Maurice Benjamin, was charged in a fifty-six count indictment with one count of wire fraud in violation of Title 18, United States Code, Section 1343, three counts of mail fraud in violation of Title 18, United States Code, Section 1341, three counts of bank fraud in violation of Title 18, United States Code, Section 1014 and one count of conspiracy to commit wire, mail and bank fraud in violation of Title 18, United States Code, Section 371.

The Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York of having violated both the conspiracy and substantive counts with which he was charged in the indictment. Judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) was rendered on June 1, 1981.

The Petitioner was sentenced to six years imprisonment and a fine of $29,000. The sentence was imposed as follows —four years on the wire fraud count, two years each on the three mail fraud counts to run consecutive to each other and concurrent to all of the other counts, two years each on the three bank fraud counts to run consecutive to each other and concurrent to all of the other counts, and four years on the conspiracy count to run concurrent to all of the other counts.

In substance, the Petitioner was charged along with five other defendants of using checks drawn on the First National Bank of Tehran ("FNBT"), a purportedly fictitious off-shore bank, as a part of a scheme and artifice to defraud

The substantive counts against Benjamin at trial concerned the purchase by Big Rock Foods over a period of two weeks in November, 1978 from Mrs. Amelar, an 84 year old widow and President of Joseph Amelar, Inc., a wholesale meat company of over $84,000. worth of processed hams for resale with a series of three First National Bank of Tehran ("FNBT") checks which appeared to have been certified by "FNBT". These checks were deposited by Amelar with its New York bank, Marine Midland, who in turn sent them through the mail to the First National Bank of Tehran in St. Vincent for collection. These mailings were not the mailings set forth in the mail fraud counts. Thereafter, Marine Midland sent a follow-up telex to the issuing St. Vincent "bank" regarding the non-payment of the St. Vincent checks. Approximately one month later, having obtained in effect a month's credit from Amelar, Benjamin replaced the first Tehran check for $15,000 with a bona fide certified check from Bankers Trust. As a result of other payments, Amelar & Co., lost approximately $40,000.00 in its dealings with Benjamin.

Maurice Benjamin's defense on these charges was based on a claim that the transactions were factoring transactions between Big Rock Foods and Process Meats, a company owned by Anthony DeAngelis. Moreover, Benjamin attempted to show that Joseph Amelar & Co., was to apply monies received from Process Meats which in turn had received funds from the factoring of Big Rock Food's accounts receivable.

Prior to trial, Petitioner's attorney moved to dismiss the mail and wire fraud counts contending that neither the mail or wire was used in furtherance or in execution

of the alleged scheme and artifice to defraud. A motion was also made to dismiss the bank fraud as the Petitioner had not sought an extension of credit or any advance from the Marine Midland Bank where the three checks were deposited. All the motions were denied. The motions were renewed at the close of the government's case and again at the close of the entire case. Also, the Petitioner's attorney moved for a dismissal of the conspiracy count on the basis of the government having alleged one continuing conspiracy among the defendants but having proven muliple, separate and distinct conspiracies and having failed to prove that Petitioner was a member of the conspiracy alleged in the indictment. All of Petitioner's motions were denied.

During most of the trial Petitioner was incarcerated because of a prior federal conviction On November 25, 1981, after completing the sentence he was serving, he was released on bail in this case by Judge Gagliardi. Less than one month after his release on bail, the Petitioner's bail was revoked.

From June 1, 1981, until November 25, 1981, when Petitioner was released on bail by Judge Gagliardi, the Petitioner was incarcerated in various federal prisions outside of the New York area. Petitioner had retained the law firm of Rockman, Platzer & Fallick to prosecute his appeal. He had very little time to confer with his appeal counsel before he was shipped to a federal prison outside of New York. Appeal counsel completed his brief on August 19, 1981. The Petitioner did not see the brief or have an opportunity to review its contents until on or about October 28, 1981. At that time, he sent a Mailgram to his appeal attorney and to the Court of Appeals seeking an adjournment of the oral argument so that he could have the brief corrected and could respond to the government's brief. Copies of the Mailgrams are reprinted at Pet. App. C, Infra, Pgs. 20-22. The Court below denied the Petitioner's application.

The brief submitted by the Petitioner's attorney did not address itself to the issues of whether the mail and wire fraud counts was used in furtherance or in execution of the alleged fraud and artifice to defraud It did not address itself to the question of multiple conspiracies and the variance of the government's allegation of one conspiracy and proof of separate and distinct conspiracies. It did not address itself to the issue that the government failed to prove beyond a reasonable doubt that Petitioner was a member of the conspiracy alleged in the indictment or the prejudicial spillover to the Petitioner because of the joint trial of separate and distinct conspiracies. All of these issues were raised during the trial. Petitioner's attorney only addressed himself to the bank fraud counts and used the same arguments on appeal with regard thereto as were established by trial counsel. The conviction on these counts were reversed.

Reason for Granting Writ

The law to be presented for review will assert that the *Sixth Amendment* to the *United States Constitution* guarantees the Petitioner counsel during every stage of the criminal proceeding, including the appeal. It is the contention of the Petitioner that he was denied counsel during his appeal by being incarcerated some 1,200 miles away from his attorney during the preparation of his appeal brief and being denied an adjournment of oral argument when he first saw the brief after it was already filed and asserted that it was deficient and requested an adjournment from the Court of Appeals so that his attorney could amend the brief or address the areas in which it was deficient during oral argument.

A defendant is entitled to counsel at every stage in the criminal proceedings against him. *Powell* v. *State of Alabama*, 53 S. Ct. 55, 287 U.S. 45, 77 L Ed 158 (1932).

The right to counsel begins when the defendant is first taken into custody or otherwise deprived of his freedom in any significant way. *Miranda* v. *State of Arizona*, 86 S. Ct. 1602, 348 U.S. 436, 16 L Ed 2d 694 (1966). He is entitled to the assistance of counsel until he has exhausted his right to appeal. *Anders* v. *State of California*, 87 S. Ct. 1396, 386 U.S. 738, 18 L. Ed. 2d (493) (1967). The right to the assistance of counsel means the effective assistance of counsel. *Powell* v. *State of Alabama*, supra, *Anders* v. *State of California*, supra. It is the Petitioner's contention that he has been denied effective assistance of counsel with regard to his appeal filed with the United States Court of Appeals For the Second Circuit. The Petitioner was some twelve hundred miles away from his attorney and incarcerated in prison while his appeal was being prepared. He was unable to communicate with his appeal counsel during the preparation of his brief. He did not see the brief that was prepared by his counsel until after it was filed with the Court of Appeals which was approximately one week before the case was scheduled for oral argument. He did not know the grounds his counsel had set forth in the appeal until he saw the appeal. He did not have an opportunity to read the government's answering brief. It is the Petitioner's contention that he has a right to confer with and assist counsel in the preparation of his appeal and that a denial of that right results in his being denied effective assistance of counsel. This contention of the Petitioner was raised by him with his counsel and the Court of Appeals prior to oral argument. Under such circumstances, as the Court of Appeals denied Petitioner's motion for an adjournment of oral argument so that he might have the opportunity to confer with counsel, review the brief and suggest changes in Petitioner's brief and have counsel prepare a reply brief, it is Petitioner's contention that he has been denied effective assistance of counsel.

The Petitioner contends that he was under medication during the trial which affected his memory and prevented him from assisting trial counsel. He did not learn of this fact until after trial. However, his trial counsel did make a record during the trial that the defendant seemed to be having a problem remembering relevant and material facts and that trial counsel was having difficulty communicating with the defendant because of this during the trial. The Petitioner wanted this issue raised in this appeal.

Trial counsel had moved to dismiss the mail fraud counts which were counts 43, 44 and 45 of the indictment. The basis of the motion was that the mailings were not an integral part of the alleged artifice and scheme to defraud and were not made in furtherance of or in execution of the alleged scheme and artifice to defraud. The letters were collection letters sent by the Marine Midland Bank to the First National Bank of Teheran seeking information concerning three checks which had previously been sent by the Marine Midland Bank to the First National Bank of Teheran for collection. These letters were not transmittal letters whereby the checks were mailed to the First National Bank of Teheran for collection. This issue was not raised by Petitioner's counsel on appeal. It is not a frivolous issue.

Count 29 of the indictment alleges use of the wire in furtherance of an alleged scheme and artifice to defraud. The wire in question was sent on December 26, 1978 and was an inquiry as to what had happened to the three checks that had been sent to the First National Bank of Teheran in November, 1978. Trial counsel moved to dismiss the wire fraud count as use of the wire was not an integral part of the alleged scheme and artifice to defraud and because the wire was not sent in furtherance of or in execution of the alleged artifice and scheme to defraud. The motion was denied. Appeal counsel did not raise this issue on the appeal. Again, it is not a frivolous issue.

Trial counsel had moved to dismiss the conspiracy count on the ground of a variance between the indictment that alleged one continuing conspiracy and the proof at trial that showed multiple conspiracies without a common goal and on the ground that the Petitioner was not a party to the conspiracy alleged in the indictment. Trial counsel argued that the misjoinder had caused substantial prejudice to the Petitioner because of the spillover effect of the mass trial. Counsel on the appeal did not raise this issue. This issue is not frivolous.

The only counts challenged on the appeal were counts 43, 44 and 45 which alleged bank fraud. Trial counsel moved to dismiss these counts during trial as the Petitioner did not seek an advance or other extension of credit from the Marine Midland Bank. The motion was denied. Appeal counsel adopted trial counsel's argument in his brief and all three counts were reversed.

The brief on appeal did not raise all of the real issues of law as to errors in the trial and with regard to the trial court's denial of trial counsel's motions for dismissal of each count in the indictment that charged the Petitioner with a crime. The Petitioner recognized the deficiencies in his brief and sought an adjournment of oral argument so that his brief could be amended. His pro-se motion was denied.

All of the circumstances surrounding the preparation and filing of the appeal brief show that the Petitioner was denied effective assistance of counsel during his appeal. He could not participate in the appeal stage of his criminal prosecution. Petitioner contends that he had a right to participate with his counsel in the preparation of his appeal and that his inability to so participate resulted in his counsel filing a brief that omitted errors at trial which could have resulted in the reversal of all of the counts on which he was convicted.

Conclusion

It would be appropriate for the Court to grant review of this case to delineate and articulate on the marked facts of this case the parameters which would constitute effective assistance of counsel during an appeal.

Respectfully submitted,

MORTON BERGER
Attorney for Petitioner
13 Eastbourne Drive
Spring Valley, N.Y. 10977
Phone: (914) 425-6484

Dated: June 24, 1982